

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 24, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2015AP435**

**Cir. Ct. No. 2012CV585**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**MIDWEST LANDSCAPE GARDEN MART, LLC,**

**PLAINTIFF-APPELLANT,**

**V.**

**MELVIN METZGER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Lundsten, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. This case began as a dispute between Midwest Landscape Garden Mart, LLC, and Melvin Metzger, when Midwest sued Metzger for preventing Midwest from removing trees that Midwest had earlier planted on Metzger's land. Midwest alleged that, in preventing the tree removal, Metzger

breached an oral agreement that he had with Midwest, through its agents, which gave Midwest a license to remove the trees, and that Metzger was unjustly enriched by the fact that the trees remained on the land.

¶2 However, Metzger died while the case was pending in circuit court, and the dispute became one between Midwest and a trust that had succeeded to the interest that Metzger and his wife had in the land. As a result of Metzger's passing, the trust filed a pretrial, evidentiary motion seeking to bar testimony by any of Midwest's agents regarding "any transaction or communication with" Metzger, pursuant to the "dead man's statute."<sup>1</sup> The court granted this evidentiary motion in favor of the trust. As a consequence of this ruling, the court dismissed Midwest's action in its entirety on the ground that, without the benefit of testimony regarding any transaction or communication with Metzger, Midwest lacked sufficient evidence to support its claim that Metzger breached the oral agreement that he had with Midwest that allegedly allowed Midwest to remove its trees from the trust property. Midwest appeals.

¶3 We conclude that the circuit court correctly applied the dead man's statute to preclude testimony related to transactions and communications with Metzger and correctly held that the attorney for Metzger and the trust did not waive the protection of the statute. We also conclude that the court properly

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<sup>1</sup> Broadly stated, Wisconsin's dead man's statute, WIS. STAT. § 885.16 (2013-14), disqualifies witnesses from testifying about any transaction or communication pertinent to a legal dispute with a person who has since died. We quote pertinent language of the statute in footnote 6 *infra*.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

exercised its discretion in determining that the facts do not support application of the equitable doctrine of unjust enrichment. Accordingly, we affirm.

## BACKGROUND

¶4 The parties do not dispute the following pertinent facts, aside from a dispute reflected in deposition testimony that we describe as part of the following chronology.

¶5 Christopher Thomas, the owner of Midwest, entered into a land contract with Metzger and Metzger's wife to purchase farm property from the Metzgers. Under the land contract, the Metzger farm was transferred to Christopher personally, not to Midwest.<sup>2</sup> Although Christopher never formally leased the farm to Midwest, Midwest paid initial land contract installments and kept equipment on the property. In addition, Midwest planted trees on the land.<sup>3</sup> About one year after entering into the land contract with Christopher, the Metzgers assigned their interest in the land contract to a trust, of which Metzger and his wife were the co-trustees.

¶6 Christopher defaulted on the land contract, and the trust filed a strict foreclosure action, forgoing its right to collect the amount remaining on the debt and seeking to recover only the property. While the strict foreclosure action was pending, Paul Thomas, the president of Midwest, visited Metzger at his home.

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<sup>2</sup> We generally use first names from this point forward for the two individuals who share the surname Thomas.

<sup>3</sup> Midwest planted shrubs as well as trees, however neither side raises any distinction between trees and other plants that matters to any issue we address, and therefore for the sake of simplicity we refer to all plants at issue as trees.

¶7 We now summarize conflicting deposition testimony as part of the chronology. Metzger testified in his deposition that during this visit Paul asked Metzger to allow Paul to remove Paul’s “things” from the farm. Metzger testified that he answered yes. Metzger testified further that he did not ask Paul during this conversation what Paul meant by “things,” but that Metzger understood Paul to be referring to equipment that Midwest had stored in Metzger’s buildings. Metzger expressly denied that Paul mentioned the removal of trees from the property.

¶8 In contrast, in his deposition Paul testified that, during his visit to Metzger’s home, Paul explicitly asked Metzger to allow Paul “to get [Midwest’s] trees out” and that Metzger had said yes. Paul testified that he and Metzger did not “discuss anything else with respect to removal” apart from the trees, although Paul acknowledged that Midwest had “items that were in storage” in Metzger’s barn on the farm property.

¶9 Returning now to undisputed facts, the circuit court signed the foreclosure order, which had the effect of reverting ownership of the land to the trust. On the same day that the court signed the order, Christopher told Metzger that Christopher planned to remove trees from the trust property the next day.<sup>4</sup> Two days later, Metzger noticed people, representatives of Midwest as it turned out, removing or preparing to remove from the property trees that had been planted by Midwest. Metzger called in a trespassing complaint to law enforcement, and in response sheriff’s deputies escorted the Midwest

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<sup>4</sup> On a potentially disputed point, Christopher would later aver that Metzger voiced no objection to Christopher’s announced plan to remove trees.

representatives from the trust property before they could successfully remove the trees.

¶10 Midwest subsequently filed this action against Metzger, contending that Paul and Metzger had an oral agreement that created a “license” under which Midwest could remove the trees that Midwest had planted on the property. Midwest alleged that, in preventing the Midwest representatives from removing the trees, Metzger breached the license, and that Metzger was unjustly enriched by having the benefit of the trees conferred on him as a result of his interference with the attempt to remove them.

¶11 Metzger moved for summary judgment. In support, Metzger submitted his own affidavit, and excerpts from Paul’s deposition. This included portions of Paul’s testimony in which Paul testified that Metzger had given Paul permission to remove trees from the trust property. However, this also included testimony by Paul acknowledging that Midwest had left equipment on the property. In response, Midwest submitted excerpts from Metzger’s deposition in which he testified that Paul had asked Metzger if Paul could remove his “things” from the property, but that Paul had not referred to trees in making that request.

¶12 The circuit court made an initial determination that summary judgment in favor of Metzger was not appropriate on Midwest’s claims of a license to remove the trees and unjust enrichment to the trust.

¶13 After this initial determination by the court, Metzger died. As a result of his death, the trust took the position that previously admissible evidence was now inadmissible based on the dead man’s statute. More specifically, the trust filed a pretrial, evidentiary motion seeking to bar testimony regarding any pertinent transaction or communication with Metzger, on the ground that any

witness to such purported transactions or communications would be incompetent to testify on these topics. In support of the motion, the trust submitted two passages from Paul's deposition testimony, though none related to the substance of any transactions or communications between Paul and Metzger. Further, the trust argued that, if its evidentiary motion were granted, dismissal of both the license and unjust enrichment causes of action would be merited.

¶14 The court granted Metzger's motion to preclude witnesses from testifying in Midwest's favor regarding pertinent transactions or communications with Metzger.<sup>5</sup> Based on its evidentiary rulings, the court granted the trust's motion to dismiss the action in its entirety after concluding that the admissible evidence was inadequate to support the claim that Metzger breached his oral agreement with Midwest and that the unjust enrichment claim failed because Metzger did not receive an actual benefit from the trees that remained on his property. Midwest appeals.

## DISCUSSION

¶15 Midwest argues that the circuit court erroneously ruled that evidence was inadmissible under the dead man's statute and that, regardless of the correctness of that ruling, the court erred in dismissing Midwest's unjust enrichment claim. We reject both arguments.

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<sup>5</sup> At the same time, the circuit court ruled that Midwest would be permitted to introduce Metzger's deposition testimony at trial pursuant to WIS. STAT. § 804.07(1)(b) and (c) (allowing the use of a party's deposition for any purpose and the use of a deceased's deposition testimony at trial, respectively). However, for reasons we explain below, the court's decision to consider Metzger's deposition testimony as admissible evidence is not pertinent to our analysis on any dispositive issue.

*Dead Man's Statute*

¶16 Midwest argues that the circuit court erred in determining that the dead man's statute precludes Midwest's owner Christopher and its president Paul from testifying regarding transactions and communications with Metzger. Midwest concedes that the dead man's statute would normally apply to exclude this evidence because Metzger died while this litigation was pending. According to Midwest, however, the attorney for both Metzger before he died and for the trust after Metzger's death took actions that had the effect of waiving application of the dead man's statute. We disagree for the reasons that follow.

¶17 As we have previously explained, the dead man's statute "disqualifies a witness to a transaction or communication with a decedent from testifying about that transaction or communication in his or her favor, or in the favor of any party to the case claiming under the witness." *Rutter v. Copper*, 2012 WI App 128, ¶17, 344 Wis. 2d 596, 824 N.W.2d 885 (quoted source omitted).<sup>6</sup> It "stems from the common-law notion that courts must safeguard

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<sup>6</sup> The dead man's statute provides in pertinent part:

No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased ... person in any civil action ..., in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased ... person,... unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. And no ... officer ... of a corporation in its behalf or interest, and no ... officer ... of a corporation from, through or under whom a party

(continued)

proceedings from interested parties misrepresenting transactions or communications with a person who cannot rebut the party’s testimony due to death or mental incapacity.” *See id.*, ¶12.

¶18 Midwest does not argue that this codification of the common law rule does not apply to the disputed testimony of Christopher or Paul, or that their proffered testimony does not relate to a transaction or communication with Metzger. Instead, Midwest’s only argument is that Metzger and his trust “waived” application of the statute. As used in this context, “waiver is the intentional relinquishment or abandonment of a known right.” *See State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612.<sup>7</sup> Specifically, Midwest argues that Metzger and the trust intentionally relinquished the known right to rely on the dead man’s statute both before Metzger died—when Metzger offered his own affidavit and excerpts of Paul’s deposition as evidence in support of Metzger’s motion for summary judgment—as well as after Metzger died—when the trust offered excerpts of Paul’s deposition in support of the trust’s evidentiary motion and motion for dismissal.

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derives the party’s interest or title, shall be so examined, except as aforesaid.

WIS. STAT. § 885.16. The statute has long been subject to criticism, *see Long v. Molay*, 46 Wis. 2d 450, 458-59, 175 N.W.2d 254 (1970) (our supreme court has “frequently expressed its feeling” that the dead man’s “statute rests upon an archaic view of the law” and there is an “evident lack of rational basis for the statute”), but it remains the law in Wisconsin, and therefore the courts are bound to apply it. *See Rutter v. Copper*, 2012 WI App 128, ¶13, 344 Wis. 2d 596, 824 N.W.2d 885.

<sup>7</sup> There was traditionally some confusion and inconsistency in Wisconsin law regarding the distinctions between the concepts of “waiver” and “forfeiture.” In *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612, our supreme court provides an in-depth discussion of the two concepts. However, we do not resolve the question of which term properly applies in this context. Instead, we assume without deciding that waiver was possible and address Midwest’s arguments on that basis.

¶19 We first address Midwest’s argument that Metzger waived application of the dead man’s statute during Metzger’s lifetime, by submitting Metzger’s affidavit and excerpts of Paul’s testimony in support of Metzger’s summary judgment motion. We reject this argument as lacking any support in law or logic. When Metzger’s attorney submitted his summary judgment motion and the supporting materials, Metzger was still alive, and therefore the dead man’s statute could not have applied. Midwest fails to explain how Metzger or the trust could have intentionally relinquished or abandoned the operation of the statute at a time when the statute did not apply and thus was not a “known right” that could be waived.

¶20 We turn to Midwest’s argument that the trust waived the protection of the dead man’s statute after Metzger’s death by offering excerpts of Paul’s deposition testimony in support of the trust’s evidentiary motion and motion for dismissal. Midwest argues that the attorney for the trust acted in a manner that resulted in the trust relinquishing its right to invoke the dead man’s statute. We reject this argument as unsupported by legal authority for reasons we now explain.

¶21 At least in the normal course, the following conduct will result in a waiver of the protection of the dead man’s statute: (1) failure to explicitly object to the competency of witnesses to testify; or (2) cross-examining witnesses about any person’s transactions or communications with the decedent. *See Long*, 46 Wis. 2d at 459-60. For the following reasons, we reject Midwest’s argument that after Metzger died, his attorney took actions that waived the potential for application of the dead man’s statute in this case.

¶22 We first observe that the attorney for the trust raised a valid objection under the dead man’s statute, because the attorney expressly objected in

the evidentiary motion to the admission of testimony by “Paul Thomas and any other person” “with respect to any transaction or communication with” Metzger, “on the grounds of said witness’ incompetency to testify” under the dead man’s statute. See *Gerczak v. Estate of Gerczak*, 2005 WI App 168, ¶13, 285 Wis. 2d 397, 702 N.W.2d 72 (“To be valid, an objection under WIS. STAT. § 885.16 must ... be addressed not to the admissibility of the evidence, but to the witness’s competency to testify about a particular conversation or transaction.”).

¶23 Regarding the second potential way in which an attorney can waive protection of the dead man’s statute, we observe that after Metzger died, the attorney for the trust did not question any witness about any transactions or communications with Metzger, and did not offer into evidence any testimony regarding the substance of any transactions or communications with Metzger. Our supreme court has examined whether an attorney, under circumstances similar to those here, waived his deceased client’s protections under the dead man’s statute in questioning certain witnesses, explaining as follows:

[I]f counsel for the opposite party questions the witness as to any part of the transaction or communication with the deceased under circumstances where the witness would be incompetent to so testify if proper objection were made under sec. 885.16, Stats., the benefit of the statute is waived and the door is opened whereby counsel for the party may proceed by further questioning to bring out all details of the particular transaction or communication.

*Johnson v. Mielke*, 49 Wis. 2d 60, 71, 181 N.W.2d 503 (1970).

¶24 In *Johnson*, the court concluded that the protection of the statute was not waived by the decedent’s estate when it called a surviving witness adversely and introduced testimony about transactions with the deceased, despite the fact that counsel for the decedent’s estate “inquired as to physical acts done by

[the defendant] and the decedent.” There was no waiver because the testimony at issue established “only independent facts made up of the physical actions of the parties, and in no way opens the door to what, if anything, actually transpired between them with regard to those actions.” *Id.* at 71-72.

¶25 Like the attorney in *Johnson*, the attorney for the trust here was careful not to present testimony from witnesses regarding “any part of the transaction or communication with the deceased” about removing the trees from the land. *See id.* at 71. Thus, the protection of the dead man’s statute remained available.

¶26 Midwest’s final argument regarding the dead man’s statute appears to be a “catch-all” argument. It is that even if Metzger or the trust did not waive the protection of the dead man’s statute by offering certain pieces of evidence in support of their motions, Midwest may offer Metzger’s deposition into evidence. We understand Midwest to be arguing that the fact that Midwest took Metzger’s deposition and Metzger testified as to the transactions and communications that form the basis for this action in some way renders Christopher and Paul competent to testify regarding these transactions and communications with Metzger. Midwest appears to recognize that the only authority it cites in this connection on its face undermines Midwest’s position. For example, Midwest cites *McIndoe v. Clarke*, 57 Wis. 165, 15 N.W. 17 (1883),<sup>8</sup> in which the court held that a party adverse to the representative of a deceased defendant does *not* render itself

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<sup>8</sup> At the time of *McIndoe v. Clarke*, 57 Wis. 165, 15 N.W. 17 (1883), the Wisconsin dead man’s statute was codified at WIS. REV. STAT. § 4070 (1878). Although there have been some minor changes to the wording of the statute, the 1878 version is similar enough to the current version not to effect the analysis here.

competent as a witness by offering as evidence a deposition of the defendant taken by the adverse party during the defendant's lifetime. *See id.* at 168-69. Midwest argues that the fact that it was Midwest's attorney, as opposed to Metzger's own attorney, who took Metzger's deposition distinguishes the facts here from *McIndoe* and the other authority. We fail to see why it would matter for purposes of the dead man's statute which party took the deposition when Metzger was living or how these cases otherwise support Midwest's waiver arguments.

¶27 This resolves the only objections Midwest makes to application of the dead man's statute in this case, and therefore we affirm the circuit court's decision that the dead man's statute applies to render any witness testifying in Midwest's favor incompetent to testify to any transactions or communications with Metzger.<sup>9</sup>

#### *Unjust Enrichment*

¶28 Regarding its unjust enrichment claim, Midwest argues that, even if Christopher and Paul are precluded from offering testimony regarding their transactions and communications with Metzger, Midwest has presented "sufficient evidence" to establish unjust enrichment. More specifically, Midwest argues that the circuit court erroneously granted summary judgment to Metzger's trust on Midwest's unjust enrichment claim, and that, instead, Midwest "should be compensated for such enrichment."

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<sup>9</sup> We need not and do not address Metzger's objection to the circuit court's decision to allow Midwest to introduce the identified portions of Metzger's deposition testimony at trial for multiple reasons. It is sufficient to note that there is no dispute that the substance of these deposition passages entirely support the trust's position on contested issues, and it would make no difference to the outcome here if we were to reverse the circuit court on this evidentiary decision.

¶29 Generally, we review a circuit court’s grant of summary judgment de novo. *Pietrowski v. Dufrane*, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109. “However, when the grant of summary judgment is based on an equitable right, as in this case, we apply a two-tiered standard of review.” *Id.* (citing *Singer v. Jones*, 173 Wis. 2d 191, 194-95, 496 N.W.2d 156 (Ct. App. 1992)). We review the legal issues de novo but review the decision to grant or deny equitable relief for an erroneous exercise of discretion. *Pietrowski*, 247 Wis. 2d 232, ¶5. We sustain discretionary decisions if the circuit court examined the relevant facts, applied a proper standard of law and, using a rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶30 As Midwest concedes, the circuit court “applied the proper law in its analysis of Midwest Landscape’s claim, assessing the claim against the three elements of unjust enrichment.” Further, neither party points to any disputed material facts. Thus, “[t]he only dispute in this case is whether the circuit court erroneously exercised its discretion” in denying Midwest’s “request for equitable relief.” See *Pietrowski*, 247 Wis. 2d 232, ¶6; see also *Singer*, 173 Wis. 2d at 194-95 (at summary judgment in an equitable action, if there are no material issues of fact for trial, the court must determine whether, in its discretion, equitable relief is warranted).

¶31 Proof of an unjust enrichment claim must satisfy each of three elements:

- (1) a benefit conferred upon the defendant by the plaintiff,
- (2) knowledge or appreciation of the benefit by the defendant, and
- (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him or her to retain it without paying the value thereof.

*Ludyjan v. Continental Cas. Co.*, 2008 WI App 41, ¶7, 308 Wis. 2d 398, 747 N.W.2d 745 (circuit court properly exercised discretion in determining that plaintiff-tenants failed to prove unjust enrichment by defendant-landlords, even though plaintiffs had erected buildings on landlords' property prior to landlords' decision to terminate lease).

¶32 The circuit court exercised its discretion to reject the unjust enrichment claim on the ground that the undisputed facts show that Midwest failed to satisfy the first element of unjust enrichment. More specifically, the circuit court found that the undisputed facts showed that Midwest did not confer an actual benefit on Metzger by planting trees on Metzger's property. The court based its decision on Metzger's deposition testimony that he personally did not receive any money from the sale of the trees, and that at least two companies had come out to examine the trees and were not interested in them. The court determined that "[t]he mere existence of the trees ... no more satisfies the 'benefit' criteria than the existence of buildings did in *Ludyjan*. There must be more, and there is none here ...." We see no basis on which to upset the court's discretionary decision.<sup>10</sup>

¶33 Midwest's argument is that, even assuming that the dead man's statute applies, so that Christopher and Paul are not allowed to testify regarding transactions or communications with Metzger, there was "sufficient evidence to support" a finding that Metzger was unjustly enriched because of the "potential"

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<sup>10</sup> To clarify, in making this finding, the court explicitly declined to consider Christopher's and Paul's testimony regarding their transactions or communications with Metzger, based on the dead man's statute, and found that the only relevant evidence on this topic was contained in Metzger's deposition testimony.

economic value of the trees that remained on Metzger's property. We reject this argument, for the reasons set forth below.

¶34 There are at least two problems with Midwest's argument. First, the question is not, as Midwest would have it, whether the trees might have had some theoretical "potential" value to Midwest or some other person or entity. The question under the first step of the test, as the circuit court correctly recognized, is whether the trees had *actual* value to Metzger during the pertinent time period. See *Ludyjan*, 308 Wis. 2d 398, ¶¶8, 10 (the question is whether there was a benefit or gain to the defendant, not whether there was a loss to the plaintiff; unless alleged benefit was conferred on defendant as a result of tortious conduct, plaintiff is limited by the "benefit's 'value in advancing the purposes of the recipient.'") Midwest now emphasizes one piece of evidence, namely, Metzger's deposition testimony that a person, at unknown expense and trouble, sold an unknown percentage of the trees to an unknown party or parties, and gave some of the proceeds to Metzger's children. However, the inferences that could be drawn from this evidence alone about what benefits were actually conferred on Metzger are slender.

¶35 Second, as stated above, our role on review is not to determine whether there was sufficient evidence for the circuit court to have reached a different conclusion, but rather whether the evidence was sufficient to support the decision that the court did make. See *Liddle v. Liddle*, 140 Wis. 2d 132, 150-51, 410 N.W.2d 196 (Ct. App. 1987) ("We are obliged to uphold a discretionary decision of a trial court if we can conclude, *ab initio*, 'that there are facts of record which would support the trial judge's decision'" (quoted source omitted)). We are not persuaded that the circuit court could not reasonably determine, in light of the

evidence as a whole, that the trees left on the property did not constitute a benefit conferred on Metzger.

¶36 As we briefly observed in our discussion above, the circuit court ruled that Metzger’s deposition testimony would be admissible at trial, but we need not reach any conclusion as to whether the court’s decision in that regard was proper because Midwest’s claims fail even with Metzger’s deposition testimony.

¶37 In other words, as we observed with respect to Midwest’s claim that Metzger breached his oral agreement to allow Midwest to remove the trees, Midwest’s unjust enrichment claim fails whether or not Metzger’s deposition testimony is considered along with all other evidence. When Metzger’s deposition testimony is considered, there is no evidence that Metzger personally benefitted from the trees that Midwest left on his farm. Here, as in *Ludyjan*, it was “proper to value the [trees] according to their ‘use value’ to [Metzger]: nothing.” See *Ludyjan*, 308 Wis. 2d 398, ¶10. As stated above, Metzger suggested in his deposition testimony that he had received no proceeds from the sale of any trees, and that removing the trees from the land might prove difficult, in that representatives of at least two companies had come out to examine the trees but expressed no interest in them. And, when Metzger’s deposition testimony is not considered, there is no evidence that Metzger personally benefitted from the trees.

¶38 In sum, in reaching its discretionary decision on Midwest’s unjust enrichment claim, the circuit court examined the relevant facts, applied the proper legal standard, and used a rational process to reach a conclusion that a reasonable

judge could reach in finding that there was no benefit, and thus no unjust enrichment.<sup>11</sup>

### CONCLUSION

¶39 For the foregoing reasons, we affirm.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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<sup>11</sup> Because we affirm the circuit court's decision on other grounds, we need not and do not address the trust's alternative argument for affirming the court's decision dismissing the unjust enrichment claim, which involves a standing challenge.

